

## **Draft recommendation to the European Commission in complaint 224/2005/ELB**

Recommendation

**Case 224/2005/ELB - Opened on 31/01/2005 - Recommendation on 02/07/2008 - Decision on 04/12/2009**

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1) )

### **SUMMARY**

The complainant took part in Selection Procedure COM/R/A/01/1999 organised by the European Commission, which was designed to draw up a reserve list of temporary agents in the field of Research. Following her exclusion from the Selection Procedure, she lodged an appeal with the Court of First Instance (hereinafter "the Court") against the Selection Committee's decision, dated 13 July 2000, not to include her name on the reserve list (2) . The Court annulled the Selection Committee's decision. Consequently, the Commission invited the complainant to take part in a new series of oral tests. However, in the new series of oral tests, her results were not sufficient for her name to be included on the reserve list. She lodged a complaint with the Ombudsman against the Commission's second decision to exclude her from the Selection Procedure.

On two occasions, the Ombudsman asked the Commission to inform him whether it considered that its initial opinion was still justifiable in view of the Court's decision in Cases T-156/03 and T-400/03 (3) , which concerned applicants who, like the complainant, had been excluded twice from Selection Procedure COM/R/A/01/1999.

In its replies, the Commission considered that the only effect of the above-mentioned case-law was to annul the individual decisions, concerning the applicants, not to include their names on the reserve list. As the complainant did not challenge the Selection Committee's second decision before the Court, she could not take advantage of the effects of these two cases.

The Ombudsman concluded provisionally that the Commission had failed properly to execute the Court's judgment in Case T-92/01 (4) . Therefore, he addressed a friendly solution proposal to the Commission, suggesting that it could consider compensating the complainant for the disadvantage she suffered through her loss of opportunity to sit the test properly.

In reply to the Ombudsman's proposal, the Commission maintained its position.



The present draft recommendation examines the Commission's position.

## **THE OMBUDSMAN'S CONSIDERATIONS LEADING TO THE DRAFT RECOMMENDATION**

1.1 The complainant took part in Selection Procedure COM/R/A/01/1999 organised by the European Commission. Following her exclusion from the Selection Procedure, she lodged an appeal with the Court of First Instance (hereinafter "the Court") against the Selection Committee's decision, dated 13 July 2000, not to include her name on the reserve list (5) . The Court annulled the Selection Committee's decision on the grounds that it infringed the principle of equality of treatment of candidates. The Court considered that the composition of the Selection Committee changed several times during the oral tests; no member took part in all tests; and the Selection Committee was not always composed of three members. Furthermore, the oral tests took place over a six-week period, which meant that a comparative assessment of candidates was difficult. There was no evidence that, at the end of the oral tests, the six members who had, at various times, made up the Selection Committee had undertaken a comparative analysis of the candidates' performances. This comparative analysis, which was the responsibility of the president of the Selection Committee, could not be carried out because of the use of a system of two co-presidents who jointly presided over only 9 out of 100 oral tests.

Consequently, the Commission invited the complainant to take part in a new series of oral tests. However, in that new series of oral tests, her results were not sufficient for her name to be included on the reserve list.

The complainant then lodged the present complaint against the Commission's second decision to exclude her from the Selection Procedure, alleging that the Commission had failed to comply with the principle of equality of treatment and the judgment of the Court in Case T-92/01.

1.2 Cases T-156/03 and T-400/03 dealt with the same Selection Procedure as the one at issue in the present complaint. The applicants in those cases were excluded from the Selection Procedure, first, after the initial oral tests and, second, after additional oral tests which were organised following the annulment of the Selection Committee's decision by the Court. Both applicants appealed to the Court against the second decision of the Selection Committee not to put their names on the reserve list.

On 8 June 2006, the Court concluded in both cases that the organisation of a new series of oral tests for the applicants was not the appropriate way to comply with the annulment of the first decision of the Selection Committee not to put their names on the reserve list. It considered that the Commission could have organised an autonomous specific selection procedure for the applicants or have found a fair solution to the problems resulting from their illegal exclusion from the Selection Procedure.



1.3 In the friendly solution proposal addressed to the Commission, the Ombudsman noted that the complainant's case was analogous to Cases T-156/03 and T-400/03 and that she had submitted similar arguments against the Selection Committee's second decision. In light of the above, the Ombudsman took the view that the Commission had failed properly to execute the Court's judgment in Case T-92/01. He also considered that, had the complainant not been illegally excluded from the initial Selection Procedure, she would have had an opportunity to get a permanent post at the Commission. He suggested that the Commission should extend to the complainant's case the effects of Cases T-156/03 and T-400/03 (6) and could consider compensating her for the disadvantage she suffered through the loss of opportunity to sit the test properly.

The Commission rejected the Ombudsman's proposal for a friendly solution. It admitted that the complainant's situation was similar to that of the applicants in Cases T-156/03 and T-400/03 and that, had the complainant challenged the Selection Committee's second decision before the Court, she would probably have benefited from a similar judgment. It argued, however, that the complainant had failed to lodge an appeal before the Court and that therefore the decision concerning her became definitive. If the Commission were to treat the complainant in the same way as it had treated the two applicants, it would be in breach of the principle of legal certainty.

1.4 The Ombudsman considers the Commission's position to be wrong for the following reasons.

1.5 The Ombudsman recalls that Articles 21 and 195 of the EC Treaty provide for the right to complain to the Ombudsman about potential instances of maladministration in the activities of Community institutions and bodies. He also recalls that, with an eye to protecting their rights vis-à-vis the Community Administration, those Articles offer citizens of the Union an alternative remedy to that of an action before the Community Courts (7). The above-mentioned Articles of the EC Treaty, as implemented by the Statute of the European Ombudsman (8), should be interpreted and applied in a way which is consonant with their purpose and preserves their useful effect ("*effet utile*"). In this regard, the Ombudsman refers to a situation in which a complaint to him concerns a decision of a Selection Committee in a recruitment procedure and the Community Courts have annulled similar decisions of the same Selection Committee. In such a situation and in light of the above Treaty Articles, the Commission cannot merely refer to the limited, *ratione personae*, effect of the court decision, when the Ombudsman requests it to assess the matter also in light of the findings of the pertinent court decision. To be sure, the Ombudsman understands the implications of the "*res judicata*" effect of a court decision. However, even though a candidate who has successfully complained to the Ombudsman may, formally and legally speaking, not be in the same situation as a candidate who successfully challenged a similar decision before the Community Courts, the requirement that the Commission act lawfully applies equally in relation to all candidates. This requirement, in conjunction with the need to preserve the useful effect of the right, provided for in the EC Treaty, to complain to the Ombudsman, means that the Commission should adequately address problems of legality identified by the Ombudsman, including those indicated by reference to a court decision concerning other candidates in circumstances similar to those involving the complainant. The Ombudsman will therefore make a draft recommendation concerning this



matter.

## THE DRAFT RECOMMENDATION

The Commission should reconsider its position and take measures to provide an effective remedy to the complainant for the unlawful decision adopted by the Selection Committee in this case.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 31 October 2008. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

The Ombudsman finally points out that the position adopted by the Commission in the present case is similar to the position adopted by EPSO in case 2826/2004/PB.

Strasbourg, 2 July 2008

P. Nikiforos DIAMANDOUROS

- (1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.
- (2) Case T-92/01 *Girardot v Commission* [2002] ECR-SC I-A-163 and II-859.
- (3) Case T-156/03 *Pérez-Díaz v Commission* and Case T-400/03 *Bachotet v Commission*, judgments of 8 June 2006, not yet reported.
- (4) Case T-92/01 *Girardot v Commission*, cited above.
- (5) Case T-92/01 *Girardot v Commission*, cited above.
- (6) Case T-156/03 *Pérez-Díaz v Commission*, cited above and Case T-400/03 *Bachotet v Commission*, cited above.
- (7) Case T-193/04 *Tillack v Commission* [2006] ECR II-3995, paragraph 128.
- (8) See footnote 1.